(3)

Supreme Court, U.S.
FILED
DEC 1 2000
CLERK

No. 00-502

In The

Supreme Court of the United States

JOSHUA W. and ANITA O.,

Petitioners,

vs.

USD 259 BOARD OF EDUCATION,
WICHITA PUBLIC SCHOOLS, et al.,

Respondents.

On Petition For Writ Of Certiorari
To The United States Court Of Appeals
For The Tenth Circuit

RESPONDENT U.S.D. 259's BRIEF IN OPPOSITION

David M. Rapp
Thomas R. Powell
Roger M. Theis*
Hinkle Elkouri Law Firm L.L.C.
301 North Main, 2000 Epic Center
Wichita, Kansas 67202-4820
(316) 267-2000

*Counsel of Record
Counsel For Respondent U.S.D. 259

COCKLE LAW BRIEF PRINTING CO., (800) 225-6964
OR CALL COLLECT (402) 342-2831

25pp

QUESTIONS PRESENTED

Whether Petitioners Failed To Prove Residency Under State Law As Required By The IDEA And Whether Such Claim Presents A Substantial Federal Question Meriting Review.

Whether Petitioners' Constitutional Challenge To The Kansas Residency Statute May Be Reviewed Where It Was Not Presented To The Courts Below.

Whether Parents Whose Uncooperative Conduct Prevents Local Educators From Making A Final Placement Decision Are Entitled To Equitable Reimbursement For A Unilateral Private Placement Under The IDEA.

TABLE OF CONTENTS

Page

QUESTIONS PRESENTED i

TABLE OF AUTHORITIES iii

STATEMENT OF THE CASE 1

REASONS FOR DENYING THE WRIT 10

I. PETITIONERS' FAILURE TO PROVE RESIDENCY UNDER STATE LAW PRESENTS NO SUBSTANTIAL FEDERAL QUESTION 10

II. THE COURT OF APPEALS' CONCLUSION THAT PARENTS WHO OBSTRUCT THE IEP PROCESS ARE NOT ENTITLED TO REIMBURSEMENT FOR A UNILATERAL PRIVATE PLACEMENT WAS UNQUESTIONABLY CORRECT AND PRESENTS NO ISSUE MERITING REVIEW 14

CONCLUSION 20

TABLE OF AUTHORITIES

Page

CASES

Board of Educ. v. Rowley, 458 U.S. 176 (1982)..... 15

Clay T. v. Walton County Sch. Dist., 952 F. Supp. 817 (M.D. Ga. 1997) 15

Dubois v. Conn. State Board of Educ., 727 F.2d 44 (2nd Cir. 1984) 15

E.E.O.C. v. Fed'l Labor Relations Auth., 476 U.S. 19 (1986) 14

Florence County Sch. Dist. Four v. Carter, 510 U.S. 7 (1993) 16

Murray v. Montrose County Sch. Dist., 51 F.3d 921 (10th Cir.), *cert. denied*, 516 U.S. 909 (1995)..... 15

Patricia P. v. Board of Educ., 203 F.3d 462 (7th Cir. 2000)..... 18

Sch. Comm. of Burlington v. Dept. of Educ., 471 U.S. 359 (1985)..... 16, 17, 18

Schoenfeld v. Parkway Sch. Dist., 138 F.3d 379 (8th Cir. 1998) 15, 18

Susan R.M. v. Northeast Indep. Sch. Dist., 818 F.2d 455 (5th Cir. 1987)..... 11

Tucker v. Calloway County Board of Educ., 136 F.3d 495 (6th Cir. 1998)..... 18

Vlandis v. Kline, 412 U.S. 441 (1973)..... 14

Wise v. Ohio Dept. of Educ., 80 F.3d 177 (6th Cir. 1996).....11, 18

TABLE OF AUTHORITIES – Continued

Page

STATUTES

Kan. Stat. Ann. § 72-1046(a) 11

20 U.S.C. §§ 1400 *et seq.* 11

20 U.S.C. §§ 1412(a)(10)(C)(ii) & (iii) 19

RESPONDENT U.S.D. 259's BRIEF IN OPPOSITION

Respondent U.S.D. 259 respectfully submits that the decision below correctly analyzed the facts and governing law, and that the Petition For Writ Of Certiorari, presenting no grounds for review, should be denied.

STATEMENT OF THE CASE

The controlling facts are set forth in detail in the opinion of the District Court and summarized in the opinion of the Court of Appeals. The Petition, however, largely neglects these controlling facts and contains numerous misrepresentations, omissions, and references which are not supported in the record. Significantly, the Petition makes no claim or showing that the factual findings of the District Court, upheld by the Court of Appeals, are erroneous but instead amply indulges in contrary assertions and accusations which petitioners describe as facts. Such a practice is not permissible and, as required by Supreme Court Rule 15.2, respondent presents the following supplemental statement of the case.

Joshua W. received special education from U.S.D. 259 for many years. Although making a challenge only to the 1995-96 school year in this litigation, petitioners here, consistent with their past briefs, assail the entirety of Joshua W.'s educational experience in the District.[1] App. D at 27a, n.8; App. A at 7a. Such protestations are not only irrelevant but ignore the fact that all prior IEPs,

[1] The term "District" as used herein refers to U.S.D. 259.

except for two, were made and implemented by consent. Even on the two occasions prior to this case where a due process challenge was filed, the claims were later withdrawn and those IEPs were also implemented by consent. U.S.D. 259 Supp. App. at 57-66.[2]

In November, 1994, when Joshua W. was 16, District educators duly convened an IEP team to develop Joshua W.'s IEP for the 1994-95 school year. Identifying Joshua W. as having a behavior disorder, the IEP called for placement in a special day school, which was also implemented with parental consent. In accordance with the placement, Joshua W. was transferred to Sowers Alternative School on or about November 19, 1994. After arriving at Sowers, Joshua W. was, on separate occasions, intermittently confined as a juvenile offender at the Sedgwick County Youth Residence Hall ("YRH") where he continued to receive services from the District while confined. App. D at 23a.

On January 27, 1995, Joshua W. exited YRH and never returned to Sowers. He quit attending classes in the District's schools altogether and never returned to attend classes in the District. Following his departure from the District's schools, Joshua W. inhabited a number of locations, in-state and out-of-state, under the control of his mother, Anita O. Beginning in February, 1995, shortly after he left the District, he was institutionally confined at juvenile facilities in Larned, Kansas, for approximately

---

[2] This citation refers to the Supplemental Appendix filed by this respondent in the Court of Appeals. Later citations to "Aplts' App." refer to Appellants' Appendix in the Tenth Circuit.

six months. In July, 1995, he spent a brief period of time in Charter Hospital in Wichita for substance abuse treatment followed by attendance at Shadow Mountain, a private residential facility in Tulsa, Oklahoma, where he received similar treatment for substance abuse. *Id.*

During this period following his departure from District schools, both his father and mother moved outside the boundaries of U.S.D. 259 and established residency elsewhere. On March 1, 1995, Mrs. O. moved to a new home which, though bearing a Wichita, Kansas address, she knew to be located within the Andover School District (U.S.D. 385). Likewise, in April, 1995, Joshua W.'s father moved approximately 50 miles outside the District. *Id.* at 24a.

On September 1, 1995, while en route by car to a military school in Salina, Kansas, Joshua W. threatened Mrs. O. with a knife, resulting in a charge of felony aggravated assault, in which he was prosecuted as an adult. Remaining confined in the Saline County Jail, Joshua W. entered a guilty plea to the charge on September 22, 1995, and sentencing was then set for November 20, 1995. As a condition of release before sentencing, the district court directed Joshua W. to proceed directly to attend Kemper Military Academy in Boonville, Missouri, where his mother had effected his enrollment, which he did. Signing an appearance bond on September 25, Joshua W. listed his address as that of his mother's new home. *Id.*; Aplts' App. at 241, 251, 254.

Noticeably absent from the Petition are the following facts regarding Mrs. O.'s subsequent conduct, which both courts below characterized as "manipulative." App. D at

30a; App. A at 11a. An uncontroverted record showed that in the period before sentencing, while Joshua W. was at Kemper, Mrs. O. began a frenzied effort to secure her son's placement at Three Springs Academy, a private residential facility in Centerville, Tennessee, as a condition of probation upon sentencing. Thus, the record shows that sometime prior to November 2, 1995, she contacted Three Springs and on November 4, completed an enrollment application to place Joshua W. in Centerville for the 1995-96 year. On November 6 and 7, she telephoned Three Springs a total of six times to effectuate his enrollment. Confident of his placement there, on November 16, 1995, Mrs. O. purchased two airline tickets for Joshua W. and herself for travel from Kansas City, Missouri to Nashville, Tennessee, which they did not use. As found by the District Court from the uncontroverted record, Mrs. O. had, by this time, "effectively engineered" her son's placement at Three Springs. App. D at 24a-25a, 30a.

Following these efforts, Mrs. O. then initiated contact with the District. On Friday, November 17, 1995, after Joshua W. had been absent from District schools for almost ten months, Mrs. O. contacted the principal at Sowers, where Joshua W. had last attended, advising that she wished to bring her son back into the District's schools. The principal advised her to enroll Joshua W. at Sowers since a special day school was the placement made in his last IEP dated November 18, 1994, and a status conference was arranged for Monday, November 20, 1995 to acquire information about his current situation. *Id.* at 25a.

On the morning of November 20, Mrs. O. met with Mr. Coleman, the principal, and three other members of the Sowers staff, to review Joshua W.'s status and to discuss placement options upon his return. Requesting residential placement in general, Mrs. O. signed two release forms so that staff could obtain some information about Joshua W. and his activities during his prolonged absence from District schools. Consistent with the November 1994 IEP, Mr. Coleman advised that Joshua W. should continue at Sowers in the interim pending the District's accumulation and assessment of the new information concerning Joshua and subsequent development of a new IEP and placement. Specifically, Mr. Coleman advised Mrs. O. of the need to observe Joshua W. in the educational setting and of the need to conduct a possible reevaluation before scheduling an IEP conference and making a final placement decision. Mrs. O. was aware that no placement decision had then been made or could be made until these steps had been completed, testifying that staff had not yet determined what Joshua's needs were. *Id.*; Aplts' App. at 106-07, 110-12, 114-15, 118, 127, 132, 143, 171, 173, and 196. Mrs. O. confirmed her understanding of this fact at the due process hearing:

> Q.: On the 20th wasn't there some discussion that they would need to further evaluate Josh and Josh's situation before they made a final decision on his educational placement?
>
> A.: Yes.
>
> Q.: And, in fact, you signed several forms on that occasion so they could get more information so they could make an evaluation.

A.: Yeah.

Q.: So on that date it was obvious they had not completed the evaluation process?

A.: Oh, definitely. Yeah. Aplts' App. at 132.

The record showed that Mrs. O. made misrepresentations of fact and strategic omissions at the November 20th status conference. Although having already engineered her son's placement at Three Springs, she told District staff that Joshua W. could be picked up for classes the next day at 144 S. Sheridan in Wichita, the apparent dwelling of his 20 year old sister, although he was then at Kemper. Though aware she had lived in the Andover District for over eight months, she did not mention this fact to District staff. Discussing residential placement only in general, she never advised District educators of her decision, previously made, to place her son at Three Springs. App. D at 25a. Asked why she reinitiated contact with the District when she had no intent to reintroduce him in District schools and obtain local educational services, she testified that it was simply an attempt to force U.S.D. 259 to pay for the costs of Three Springs:

Q.: Going back a little bit, so I can get this right in my mind, as of November 20th, 1995, you pretty much settled on Three Springs as a place for Joshua to go; correct?

A.: If I could find a way to do it, yes.

Q.: What do you mean by that?

A.: Well, I wanted the district to pay for it. Aplts' App. at 184.

Also unknown to Sowers staff, because not disclosed by Mrs. O. at the meeting, was the fact that Joshua W.

was scheduled for sentencing later that very day in the Saline County District Court (some ninety miles away). At the hearing, the court acknowledged Mrs. O.'s "special arrangements" with Three Springs, as did Mrs. O. herself, and in lieu of 18 months imprisonment, granted Joshua W. probation on the condition that he immediately attend and successfully complete the Tennessee program at his own expense. On November 21st, Mrs. O. and Joshua W. proceeded by plane from Kansas City to Three Springs, using separate tickets from those purchased earlier. App. D at 25a-26a; U.S.D. 259 Supp. App. at 11, 22, 26-32.

Expecting Joshua W. to attend classes the next day as indicated by Mrs. O., District staff called her house and corporate offices in the days following to learn his whereabouts and to attempt to set-up further steps toward a placement decision. Memorializing one such message received on December 1, Mrs. O. noted that the District "wanted to set-up an [sic] meeting with me which they were going to include a mental health representative and try to get some family services for Joshua and possibly some sort of direction toward a long term placement for him." Aplts' App. at 228. These telephone calls went unanswered for three weeks, until, on December 12, 1995, Mrs. O. returned a call from a District social worker advising that she had already placed her son at Three Springs and had initiated due process against U.S.D. 259, not requesting that placement be pursued by the District. On December 4, petitioners' counsel drafted a letter to the District formally requesting a due process hearing. App. D at 26a; U.S.D. 259 Supp. App. at 108-09, 134.

Due to the absence of necessary information and the inability to observe Joshua W. and perform a reevaluation, a new IEP was not developed and no placement decision was made. On January 16, 1996, during a routine review of Joshua W.'s file, the District learned that Mrs. O., his responsible parent, resided in U.S.D. 385, Andover, Kansas. App. D at 26a; Aplts' App. at 104, 106-07, 112, 132, 136, 173, 196, 228.

Joshua W. attended school in Tennessee for approximately one year and in November, 1996, the state district court modified his conditions of probation to order that he successfully complete a program at a private facility in California. However, he left that program without completion after only three months. In January, 1998, Joshua W. was sentenced to a term of 25 months imprisonment in the custody of the Kansas Department of Corrections on new charges of felony aggravated assault and possession of a controlled substance. App. D at 26a-27a.

Based on this record of uncontroverted facts, both courts below entered judgment in favor of the U.S.D. 259 defendants for the separate and independent reasons that: (1) petitioners had presented no proof to demonstrate that Joshua W. was a resident of U.S.D. 259 when Anita O. contacted the District; (2) petitioner Anita O. forfeited any right to reimbursement by her inequitable conduct which obstructed the IEP process and prevented the District from making a final placement decision. Reviewing the evidence on the state law residency issue, the District Court held "that Joshua was not entitled to educational services from the District since he was neither living in or physically present in the district in November 1995, and was not living with a parent or

person acting as a parent in the District." App. D at 28a. The Court found that both parents had moved out of the District and that there was no showing that his sister was in charge of his care and support. *Id.* at 28a-29a. The Court concluded that "the uncontroverted facts establish that, by the time of the attempt, or more accurately, the pretended attempt to enroll Joshua in November of 1995, he cannot be considered a resident of the Wichita school district." *Id.* at 29a.

Finding from the record that Mrs. O.'s conduct was "manipulat[ive]" and not "sincere", the District Court entered judgment against petitioners for the separate reason that Mrs. O.'s inequitable conduct forfeited any claim to reimbursement under the IDEA. *Id.* at 30a. Finding that Mrs. O. had "effectively engineered" a predetermined private placement before contacting the District and finding that she had engaged in misrepresentation and concealment, the Court concluded that "Anita O.'s actions were not prompted by a sincere effort to obtain a final decision from the District regarding placement, but were simply seeking to manipulate the District into funding a placement upon which she had already resolved." *Id.* (footnote omitted). The Court found that such actions "effectively frustrated the evaluation and review of Joshua's placement." *Id.* at 32a. The Court of Appeals affirmed on both grounds, concluding that "the record confirms the district court's residency determination as well as its conclusions that Anita O.'s action in unilaterally placing Joshua W. in Three Springs was manipulative, was not undertaken for education purposes, and essentially obstructed the IDEA process." App. A at 11a.

REASONS FOR DENYING THE WRIT

I. PETITIONERS' FAILURE TO PROVE RESIDENCY UNDER STATE LAW PRESENTS NO SUBSTANTIAL FEDERAL QUESTION.

Although purporting to raise a federal constitutional issue regarding the Kansas school residency statute, the Petition in fact presents nothing more than petitioners' disagreement with lower court findings of fact that Joshua W. was not a resident of U.S.D. 259 as defined by state law. Only rhetorically alleging a conflict, the Petition identifies no particularized or intolerable conflict between the Court of Appeals' construction of Kansas law and any controlling decision of this Court or parallel decisions of other Courts of Appeals. Moreover, petitioners' failure to present the alleged constitutional issue to the courts below is a bar to its consideration for the first time in this Court. For these reasons, question one presented by the Petition provides no basis for certiorari, and the writ should be denied.

Alternatively faulting either the Kansas statute or, implicitly, the findings of the lower courts, the Petition ignores a controlling point fatal to their request for review: petitioners simply failed to carry their burden to demonstrate that Joshua W. was a resident of U.S.D. 259.[3]

---

[3] Petitioners expressly admitted in their Amended Complaint that Joshua W. never lived with his mother in the Andover District, leading the courts below to conclude that he was not a resident of that District under state law. App. F at 42a; App. A at 8a-9a. Petitioners failed to controvert the facts stated by respondent Tompkins, resulting in dismissal of their claim against him, and failed to properly appeal the dismissal of their

Containing no definition of residency, the IDEA, 20 U.S.C. §§ 1400 *et seq.*, follows the various laws of the individual states regarding who is a resident of a school district entitled to services under the Act. *Wise v. Ohio Dept. of Educ.*, 80 F.3d 177, 182 (6th Cir. 1996); *Susan R.M. v. Northeast Indep. Sch. Dist.*, 818 F.2d 455, 458 (5th Cir. 1987). Here, controlling Kansas law, as set forth in Kan. Stat. Ann. § 72-1046(a), defined residency for school purposes as follows:

> "Any child who has attained the age of eligibility for school attendance may attend school in the district in which the child lives if (1) the child lives with a resident of the district and the resident is the parent, or a person acting as parent, of the child; * * * "

The terms "parent" or "person acting as parent" are defined in subsection (d):

> "(1) 'Parent' means and includes natural parents, adoptive parents, stepparents, and foster parents;
>
> (2) 'person acting as parent' means (A) a guardian or conservator, or (B) a person, other than a parent, who is liable by law to maintain, care for, or support the child, or who has actual care and control of the child and is contributing the major portion of the cost of support of the child, or who has actual care and control of the child with the written consent of a person who has legal custody of the child, or who has been

---

claim against the Kansas State Board of Education. App. D at 31a-32a; App. A at 11a-12a.

> granted custody of the child by a court of competent jurisdiction; and, * * * ."

Thus, a minor student in Kansas establishes residency by showing that he lives within the school district from which he seeks services with a custodial parent or with a person acting as parent who is a resident of that district. Although providing for other possibilities, Kansas law primarily anchors the residence of a minor student to that of his parents, grounded upon the fact that a child's parents have the duty to provide for the care and support of the child and are in control of his affairs, particularly including his education. In keeping with this principle, Mrs. O. made it plain that she provided all of his financial support and was in charge of his affairs, particularly including his education. App. D at 29a.

The Court of Appeals properly affirmed the District Court's finding that petitioners failed to show that Joshua W. lived within U.S.D. 259 with a custodial parent or person acting as a parent. At the time Mrs. O. made the "pretended attempt" to enroll her son in November, 1995, it is uncontroverted that neither she, nor Joshua W.'s father, were residents of U.S.D. 259, both having moved months before, and thus, Joshua W. did not live within the District with a custodial parent. App. D at 24a, 28a-29a. Equally clearly, there was no proof that Joshua W. lived within the District with a person to whom his care had been formally delegated. There was no proof that Joshua W. ever inhabited his former Wichita address at anytime after August, 1995, it being uncontroverted that he was, respectively, in jail, and at Kemper, in the fall of 1995, never returning to the former address. Moreover, the record showed that Mrs. O. never delegated care of

Joshua W. to his sister, whether in writing, as required by statute, or in practical effect, at anytime, nor was his sister shown in any manner to contribute to his support or be in charge of decisions regarding his education. *Id.* It was Mrs. O. and Mrs. O. alone that was in charge of Joshua W.'s affairs and at the time she approached the District, Joshua W. did not even live within the District, much less reside there with an adult to whom his care had been delegated.

Attempting to mask their failure of proof under state law, petitioners disingenuously assail the result by likening Joshua W. to an IDEA student who, unable to receive FAPE from his home district, nevertheless remains a resident while away from home at school. But this is not such a case. Joshua W., a minor in November, 1995, was found to be a nonresident because he neither had a parental anchor in the District nor residency therein with any other adult to whom his care had been delegated, not because he merely attended school out of the District. A mere subjective desire, without tangible habitation or parental anchor in the District, did not render him a resident of U.S.D. 259.

At bottom, the Petition presents merely petitioners' disagreement with the District Court's adverse finding of fact that Joshua W. failed to prove his residency under Kansas law. This fact-bound determination of state law presents no important or recurring federal question meriting the exercise of this Court's discretionary jurisdiction. Glaringly absent from the Petition is any demonstration of an intolerable conflict between the decision below and any decision of this Court or of other Courts of Appeals, and the Petition should be denied.

Petitioners' after-the-fact challenge to the constitutionality of the statute, alleging that it erects a conclusive presumption against residency, is similarly lacking. Significantly, petitioners failed to raise this issue at anytime in the lower courts, and the issue cannot be presented for initial consideration now. *E.E.O.C. v. Fed'l Labor Relations Auth.*, 476 U.S. 19, 24 (1986). Moreover, on its face, the Kansas statute permits a broad variety of circumstances in which school district residency may be established and erects no irrebuttable presumption or wall against evidentiary proof as condemned in *Vlandis v. Kline*, 412 U.S. 441 (1973). Petitioners simply failed to establish their residency as defined by state law. That failure lies with petitioners, and not with the Kansas statute. The Petition for Certiorari should be denied.

II. THE COURT OF APPEALS' CONCLUSION THAT PARENTS WHO OBSTRUCT THE IEP PROCESS ARE NOT ENTITLED TO REIMBURSEMENT FOR A UNILATERAL PRIVATE PLACEMENT WAS UNQUESTIONABLY CORRECT AND PRESENTS NO ISSUE MERITING REVIEW.

Unchallenged findings of fact demonstrating parental obstruction and manipulation of the IEP process stand as an independent ground for denial of the writ. The decision below is but one of a consistent line of cases in the Courts of Appeals refusing to award equitable reimbursement to parents whose conduct prevents a school district from having a full and fair opportunity to make a final placement decision under the IDEA. Unable to demonstrate error in the Court's findings, which are based on uncontroverted facts derived in large part from Mrs. O.'s

own admissions, petitioners simply ignore them, employing accusations in lieu of record facts. For this separate reason, the writ should be denied.

In enacting the IDEA, Congress envisioned that adherence to proper procedures by parents and educators alike would normatively result in informed placement decisions for disabled children. *Board of Educ. v. Rowley*, 458 U.S. 176, 206 (1982). The IDEA establishes an elaborate and structured system for the identification, evaluation, and placement of disabled children and contemplates that cooperative efforts, exchange of information, and fair dealing among parents and educators will lead to substantively appropriate decisions. App. D at 29a ("The purpose of the IDEA is to ensure that the local educational agency and the parents work collectively in finding an appropriate placement for their child.") (citation and internal quotation marks omitted). *See also Schoenfeld v. Parkway Sch. Dist.*, 138 F.3d 379, 381 (8th Cir. 1998) (an IEP "must be developed through the cooperation of school officials and parents"). En route to conducting an evaluation of a child and reaching a final placement decision, local educators are entitled to rely on their own observations, data, and personnel. *Dubois v. Conn. State Board of Educ.*, 727 F.2d 44, 48 (2nd Cir. 1984). Parents dissatisfied with the final placement decision are entitled to initiate due process proceedings after "a decision is made [by the LEA] proposing or refusing to initiate or change the identification, evaluation, or placement of the child." *Clay T. v. Walton County Sch. Dist.*, 952 F. Supp. 817, 824 (M.D. Ga. 1997). *See also Murray v. Montrose County Sch. Dist.*, 51 F.3d 921, 925 (10th Cir.)

("school district decision" may be challenged in due process hearing), *cert. denied*, 516 U.S. 909 (1995). The requirement of finality is implicit in this Court's decision in *Sch. Comm. of Burlington v. Dept. of Educ.*, 471 U.S. 359 (1985), where the Court held that parents who unilaterally place their child in a private school pending IDEA review proceedings may obtain reimbursement if they show that the district's IEP placement was inappropriate and their own appropriate. *See also Florence County Sch. Dist. Four v. Carter*, 510 U.S. 7, 16 (1993) (same; recognizing that IDEA remedies are governed by "equitable considerations").

Here, an uncontroverted record demonstrates, consistent with the findings of both courts below, that Mrs. O.'s "manipulative" conduct "essentially obstructed the IDEA process", depriving District educators of a fair opportunity to make a final placement decision. App. A at 11a; App. D at 30a, 32a. Tellingly, the record shows that Mrs. O. had already "effectively engineered" her son's private placement at Three Springs before she contacted U.S.D. 259 staff. App. D at 30a. Once contacting District officials, she engaged in misrepresentation and calculated omission rather than engaging in a forthright and cooperative exchange of information to enable the District to properly evaluate her request. Thus, although knowingly residing within the Andover District, she did not mention this fact; although having already secured her son's placement in Tennessee, she did not disclose her efforts or even mention Three Springs at all; aware of court proceedings involving her son later that very day, she did not disclose his conduct or status; and knowing her plans to leave immediately for Tennessee, falsely told District

educators that her son could be picked up for school in Wichita the next day. *See* Respondent's Brief In Opposition at pp. 6-7.

Following her disingenuous "consultation" with the District, Mrs. O. then took Joshua W. to her predetermined placement the next day, depriving District educators of any opportunity to evaluate him and develop an informed placement decision. Since her son had been absent for almost ten months, Mrs. O. was aware that the District wished to personally observe him in the classroom setting at Sowers and would most likely reevaluate him before determining final placement. She admitted that the District did not refuse residential placement on November 20; that she knew further review and proceedings by the District were necessary; and that no final placement decision had been made when she removed him to the distant placement in Tennessee. App. D at 25a, 30a. *See also* Aplts' App. at 274, Plaintiffs' Amended Complaint, ¶ 29 (admitting that no final placement decision had been made when Joshua W. was removed and due process commenced). Mrs. O.'s conduct is the antithesis of the good faith predicate required for equitable reimbursement under *Burlington*.[4]

The Court of Appeals' decision is but one in an unbroken line of cases denying reimbursement to parents whose inequitable conduct prevents local educators from having a fair opportunity to make a final placement decision. Thus, the Courts of Appeals have consistently held

---

[4] The Petition notably fails to mention or confront these uncontroverted facts.

that where parents unilaterally remove their child to a private placement and commence due process before any final placement decision has been made by school officials, parents forfeit any right to equitable reimbursement under the IDEA. *Schoenfeld v. Parkway Sch. Dist.*, 138 F.3d 379, 381-82 (8th Cir. 1998) ("Parkway had no opportunity to provide an appropriate education for Scott in the public school as is preferred under IDEA because he transferred to private school after only one day in eighth grade without any discussion with Parkway officials about possible accommodations to meet his current needs * * * Since Parkway was denied an opportunity to formulate a plan to meet Scott's needs, it cannot be shown that it had an inadequate plan under IDEA. Reimbursement for the costs of his private placement would therefore be inappropriate because school officials were excluded from the decision, and [ ] because no showing of inadequate services under IDEA can be made.") (citations omitted); *Patricia P. v. Board of Educ.*, 203 F.3d 462, 468-69 (7th Cir. 2000) (quoting *Schoenfeld*, Court "hold[s] that parents who, because of their failure to cooperate, do not allow a school district a reasonable opportunity to evaluate their disabled child, forfeit their claim for reimbursement for a unilateral private placement."); *Tucker v. Calloway County Board of Educ.*, 136 F.3d 495, 503-05 (6th Cir. 1998) (same); *Wise v. Ohio Dept. of Educ.*, 80 F.3d 177, 184-85 (6th Cir. 1996) (same). Like these cases, the Tenth Circuit's decision accords with the equitable principles of the IDEA and with the decision in *Burlington*, barring reimbursement where the parents' inequitable conduct deprives school officials of the opportunity to make a final placement decision. Based upon an unchallenged factual

record showing parental deception and manipulation, the decision of the Court of Appeals denying reimbursement is even more compellingly correct than the cited cases. The District cannot be compelled to pay for the costs of a placement in which it had no opportunity to participate.

Beyond the substantive correctness of the Court's decision and its uniformity with other decisions, another important factor warrants a denial of the writ here. The issue addressed by the Court of Appeals is unlikely to recur, and if it should, will arise under a different legal framework. The decision in this case, like those cited above, all arise under the former version of the IDEA before its recodification in 1997. The amended IDEA has a specific provision requiring parents to provide ten days notice to school officials of their intent to unilaterally remove their child from the public schools in order to allow educators an informed opportunity to address parental concerns. 20 U.S.C. §§ 1412(a)(10)(C)(ii) & (iii). Therefore, review of the Court of Appeals' decision will not provide guidance on an issue likely to recur in the future, as new cases, if any, will arise under the amended IDEA.

CONCLUSION

For the foregoing reasons, the Petition for Writ of Certiorari to the United States Court of Appeals for the Tenth Circuit should be denied.

Respectfully submitted,

DAVID M. RAPP
THOMAS R. POWELL
ROGER M. THEIS*
HINKLE ELKOURI LAW FIRM L.L.C.
301 North Main, 2000 Epic Center
Wichita, Kansas 67202-4820
(316) 267-2000
*Counsel of Record**
Counsel For Respondent U.S.D. 259